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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 379

PHILIP SHARE, IRVIN GORDON and JAMES TAMER,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit.

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To the United States Court of Appeals for the Seventh Circuit.

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on June 13, 1961.

OPINION BELOW.

The opinion of the Court of Appeals (infra, p. 23) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 13, 1961 (infra, p. 34). Motion for rehearing was denied on August 2, 1961 (infra, p. 35). The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254 (1).

QUESTIONS PRESENTED.

1. Whether failure to file wagering excise tax returns and pay the tax, due subsequent to arrest, may constitute the gravamen of criminal charges, where to file such returns and pay such tax would incriminate the defendants of pending charges of failing to register for the wagering business and pay the occupational tax.

2. Whether petitioners were denied a fair trial by being tried by jurors who had been exposed to prejudicial publicity as to previous felony convictions, and other criminal and prejudicial activity of the petitioners.

3. Whether it was prejudicial error for the instructions to fail to require a finding that employees of a wagering business, who were not themselves liable to pay the federal wagering taxes, knew that their employers were evading such taxes, and whether the evidence was sufficient to show such knowledge.

4. Whether bank account records and records of accounts may be seized as instrumentalities of the crimes of failing to register, to pay the federal wagering occupational tax, and to pay the wagering excise tax.

5. Whether petitioners, convicted of wilfully failing to register with the District Director of Internal Revenue (punishable by a maximum $50 fine under Section 7272 of the 1954 Internal Revenue Code), may be sentenced instead for wilfully failing to file a return (punishable by a maximum of one year's imprisonment and a $10,000 fine under Section 7203 of the Internal Revenue Code).

STATUTES INVOLVED.

Section 7203, Internal Revenue Code, 1954:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by

regulations made under authority thereof to make a return (**other than a return required under authority of section 6015 or section 6016**), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

Section 7272, Internal Revenue Code, 1954:

"In general.—any person who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50."

STATEMENT.

Petitioners and all co-defendants were convicted on all five counts of an indictment. Count I charged that defendants, engaged in the business of accepting wagers as co-partners in a wagering syndicate at Terre Haute, Indiana, conspired to wilfully attempt to evade a large part of the excise tax on wagers due and owing by said syndicate for the months of September, October and November, 1957. Count II charged that defendants, as co-partners of a wagering syndicate, did wilfully attempt to evade the excise tax due and owing by said syndicate on wagers accepted in September, 1957. Counts III and IV contained a similar charge for October and November, 1957. Count V charged that defendants, as co-partners of a wagering syndicate, wilfully failed to register with the District Director of Internal Revenue (D. A. 18-29).[1] Each defend-

[1] The record will be referred to as Defendants' Appendix and Government Appendix.

ant was sentenced to concurrent four year prison terms under the first four counts, to a one year consecutive term of imprisonment under Count V, making a total five year term and was fined $10,000 on Count I, $10,000 on Count II and $5,000 on Count V for a total fine of $25,000 (D. A. 1582-1591).[2]

The evidence adduced by the government follows: On September 1, 1957, defendant Wyatt, a resident of Terre Haute, Indiana, leased from one Traum, who operated the Manor House Restaurant at 673 Wabash Avenue in Terre Haute, some adjoining third floor premises at 671½ Wabash Avenue for September 1 to December 31, 1957 (D. A. 396, 401-402, 404, 547-548, 696). Soon thereafter, Wyatt obtained telephone service at these premises (D. A. 314, 319, 321), together with credit cards for himself, defendant Shaffer and three apparently fictitious names (D. A. 348-352). He also obtained installation of a ticker tape sports service (D. A. 408-409, 412-415). On September 13, defendants Shaffer, Horwick, Jacobson and petitioner Tamer registered in Terre Haute hotels (D. A. 371-373, 389), Shaffer and Jacobson occupying rooms reserved by Wyatt (D. A. 366, 375). On September 21 petitioners Share and Gordon also registered in a Terre Haute hotel, as did the defendant Sumner on September 26 (D. A. 392-393, 378-379). All of the defendants remained so registered until after the premises were raided on November 29, 1957, except petitioner Tamer who left on November 26, 1957 (D. A. 382, 391, 394).

On September 12, 1957, Wyatt obtained a gambling stamp from the District Director of Internal Revenue (Exhibit 1), for his business at 671½ Wabash Avenue (D. A. 298-303, 238). He also filed monthly wagering excise tax returns, for September, October and November, 1957, dated

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[2] The prison sentences of Jacobson and Sumner were suspended.

October 30, November 30 and December 31, 1957, respectively (Exhibits 2, 3 and 4; D. A. 239-240, 244-245).

Evidence was admitted that no other wagering stamps were obtained or returns filed by any of the defendants or any partnership consisting of any of them, either before or after their arrest (D. A. 221-237, 258-263, 265, 267).

Defendant Shaffer arranged with the Kaplan Sports Service for its mailing direct to his clients its bi-weekly handicapping service (D. A. 1156-1159, 1162-1163, 1167, 1170, 1170-1171, 1173-1174), and defendant Horwick arranged with this Service for one "Joe F." to pick up copies of its service, as he had done in past years (D. A. 1171-1172, 1182-1183). None of the other defendants purchased any of its service (D. A. 1166, 1177-1178, 1180-1181).

On October 2, 1957, defendant Wyatt opened a small bank account in a local bank in the name of Wyatt Service Company, and mail was received in that name both at 671½ Wabash, which was kept locked (D. A. 450-451) and at the Manor House Restaurant (D. A. 537-542). The customer usually indicated on the inside of the letter the particular defendant to whom the money was to go, which was in all cases either Shaffer or Horwick (D. A. 928-984). The postal authorities, who had been alerted and maintained a mail watch on the 671½ Wabash address, could only identify Horwick as having mailed letters, although another unidentified person assisted on one occasion (D. A. 474-480, 483).

The porter of the Manor House Restaurant cleaned the 671½ Wabash Avenue premises (D. A. 546) and delivered food there (D. A. 549-550, 558), being paid only by Wyatt and Shaffer (D. A. 561-562, 565-566). He saw slips of

[3] The last return was admitted only against Wyatt (D. A. 240, 284-285, 1399-1400, 1491).

paper (D. A. 548-549), heard telephones ring, and saw some of the defendants take notes (D. A. 553, 555, 560, 561).

The waitresses and employees at the Manor House Restaurant saw the defendants eating meals there (D. A. 489-494, 498-509, 513-527), and revenue agents observed the defendants on occasion enter and leave the 671½ premises (D. A. 568-602, 612-664). Fifty-seven persons testified they placed bets by telephone at the 671½ Wabash Avenue premises, most of whom only dealt with defendant Jules Horwick (D. A. 848, 901, 915, 924, 929, 941, 943-944, 945, 968, 987, 989, 992, 1001, 1003, 1013-1014, 1016-1017, 1019, 1032, 1039, 1053, 1068, 1081-1082, 1116, 1118, 1141, 1206, 1209, 1235, 1276, 1277), or defendant Shaffer (D. A. 852, 938, 970, 973, 977, 981, 1015, 1031, 1047, 1076, 1132, 1147, 1192, 1198).

On November 29, 1957, federal agents, after obtaining a search warrant, raided the premises. They waited until they saw Horwick leave the premises, at which time they restrained him and obtained the keys to the premises from him. They testified that, when arrested by them, he dropped the keys to the pavement, which they picked up (D. A. 695-696, 706-709, 805-807, 825-827). The agents, with guns drawn (D. A. 783, 822-823, 833) and without identifying themselves, used the keys to obtain entrance to the premises (D. A. 828, 837-838), where they found all the defendants, except Horwick, whom they arrested on the street, and Tamer, who had left the business (D. A. 709-779, 808). They seized everything in the premises. Of the items seized, Exhibits 123 through 173 were admitted into evidence (D. A. 713-769). Newspaper reporters, even from Indianapolis, either accompanied the officers or appeared during the raid (D. A. 62, 780-782).

Among the papers seized and admitted in evidence were 611 betting slips (D. A. 739-740, 745-748), covering the

last few days of the business, some of which were in the handwriting of each of the defendants (D. A. 1339-1393). In addition to the accounting records kept by defendant Wyatt (Exhibit 172), which conformed to that which he reported for September and October, 1957 (Exhibits 2, 3, 172C and 172D), two sets of summary accounting records of past winnings and losses, still not paid, were found, one of these (Exhibit 137), totaled $1,678,495 (D. A. 1289-1291) and the other (Exhibit 138) totaled $166,212 (D. A. 1292-1293). An Agent witness testified that in his opinion these records indicated that a total of $2,895,282 in gross wagers had been accepted at 671½ Wabash Street during September, October and November, 1957 (D. A. 1302-1305).

In his lengthy charge (D. A. 1453-1559), to which exceptions were taken (D. A. 1559-1576, 1442-1452), the trial judge allowed the jury to convict any defendant if he were a mere employee who did or did not receive wagers providing such employee was an aider or abettor of a partnership consisting of any two of the defendants (D. A. 1543-1544, 1549-1551, 1540-1542). The jury was also told that a conspiracy is a form of partnership and that similarity of conduct and association of defendants with each other is a fact which may be considered in determining if there was a conspiracy (D. A. 1522). The jury was permitted to consider the evidence and guilt of a defendant on one count for the purpose of determining his intent on the other counts (D. A. 1490).

Prejudicial publicity on the eve of trial. Newspaper articles were published on the week-end before trial which commenced on June 22, 1959. According to the newspapers on June 20, 1959, the United States Attorney held a conference with reporters in a Terre Haute Hotel room (Exhibit F) in which he stated that he had an "overwhelming mass of evidence" and predicted that "his

evidence [was] strong enough to warrant convictions against all eight defendants" (Exhibit B). He also "said he [would] call 200 witnesses, most of them wealthy betters and bookies who paraded before a grand jury last summer in the much ballyhooed probe"; he promised new witnesses including "nationally known persons closely connected with the sporting field"; he said this was the "most important case ever to be tried in this district" or "ever to be aired anywhere"; he reported that an observer from the Department of Justice would be present; he stated that he hoped to cut the trial to six weeks, but that the case would still cost the Government $100,000; he said that he would oppose separation of witnesses; and he implied that he might call the local Mayor and Chief of Police whom he inferred were in on the gambling enterprise (Exhibits B and D). The United States Attorney also estimated that the betting center took in millions although he could not prove that amount (Exhibit C), and that the Government had already spent $35,000 in preparing the case (Exhibit D).

The article appearing across the top of the front page of the Indianapolis Times, on the Saturday before the trial, contained the following description of the defendants (Exhibit F): "Charles L. (Buck) Sumner, who was Democratic sheriff of Marion County in 1931-34. Joey Jacobs (Joseph Jacobson), longtime Indianapolis professional gambler. Leo (Bookie) Shaffer, Chicago ex-convict, who operated the syndicate in Canada for several years before moving it to Terre Haute last September. Jules Horwick, Chicago, who ran the syndicate with Shaffer until the Canadian Mounties raided it in 1956. Philip (Flippy) Share, Minneapolis and Las Vegas, an ex-convict, who beat the rap on two murders and several bank robberies. Irwin Gordon, Las Vegas gambler. James Tamer, Detroit and Miami, previously convicted of bank robbery and gambling. Eddie M. Wyatt, Terre Haute,

longtime Terre Haute tavernkeeper who served time in Leavenworth with Share and Shaffer." The article in the Indianapolis Star carried pictures of the defendants, the caption to which referred to them as gamblers and ex-convicts (Exhibit B).

The Monday, June 22, Terre Haute Star, where the case was going to trial, in addition to containing statements attributed to the U. S. Attorney, stated (Exhibit D): "The defendants are: Leo Shaffer, Chicago, known among his associates as 'bookie'. He was fined $10,000 and costs after pleading guilty to operating a Winnepeg, Canada, gambling syndicate in the Fall of 1956. Jules Horwick, Chicago, arrested with Shaffer by Canadian authorities and fined $10,000 and costs. C. L. 'Buck' Sumner, Indianapolis, sheriff of Marion county from 1931 to 1934 and reportedly engaged in various forms of gambling for a number of years. Joseph Jacobson, Indianapolis, allegedly involved in gambling most of his adult life. E. M. Wyatt, operator of Terre Haute clubs and the man who is supposed to have rented the third floor hideout. Irwin Gordon, Las Vegas, Nev., the youngest and presumably least experienced of the defendants. Phillip Share, Las Vegas. James Tamer, Miami Beach, Fla."

All newspapers, radio and television stations carried stories (D. A. 122, 123, 127, 151, 156), but all of them were not available to petitioners in the short time before the hearings.

The U. S. Attorney asserted that there had been no proof as to what information he gave the press but he admitted talking to the press about the case and deemed it his duty to do so (D. A. 108). He also admitted talking to the press about the case in oral argument in the court below.

Before the trial began, on Monday, the defendants moved for a continuance and for a transfer (D. A. 87-90).

After hearings (D. A. 91-114), the court overruled them. (D. A. 108-112).

Of those who were asked, 40 of 43 veniremen had been exposed to newspaper articles or broadcasts about the case (D. A. 115-211, D. A. 207-9). Two of the three who had not seen articles were caused to be removed by the Government for cause, on other grounds (D. A. 138-139); the other served as an alternate juror. A few veniremen were dismissed before reaching the matter (D. A. 206, 278, 303-304). Of the 40, 29 stated that they had been exposed to newspaper articles or television broadcasts on the week-end before trial (Armstrong, D. A. 115; Lewis, D. A. 119; **Bosse,**[4] D. A. 122; Cissa, D. A. 123; **Clark,** D. A. 126; **Conlin,** D. A. 127; **Buchanan,** D. A. 147; **Carter,** D. A. 151; **Emswiler,** D. A. 152; Girton, D. A. 154; **Gladish,** D. A. 156; Hasler, D. A. 161; Bain, D. A. 164; Johnston, D. A. 172; Butcher, D. A. 178; Crosby, D. A. 183-184; **Fisher,** D. A. 185; **Flint,** D. A. 188; Ford, D. A. 191; McClain, D. A. 193; Hartzburg, D. A. 195-196; Herstine, D. A. 197-198; Hoke, D. A. 200; Galligton, D. A. 202; Cain, D. A. 204; King, D. A. 206; Milan, D. A. 207; Quinette, D. A. 209; Pruitt, D. A. 211).

The answers of three are not clear on whether they had seen or heard week-end publicity (Curtis, D. A. 129; Dodd, D. A. 130-131; Gowery, D. A. 160). Two veniremen who had seen articles were dismissed for talking with interested parties without testifying whether they had read papers over the week-end (Burnett, D. A. 176-177; Boyle, D. A. 207-209). Only six of the 40 affirmatively said they had not been exposed to articles or newscasts over the week-end, but had seen earlier articles (Black, D. A. 129; Duling, D. A. 133; **Embree,** D. A. 135; **Johnson,** D. A. 168; **Foster,** D. A. 175; and Jewell, D. A. 167). All

[4] The veniremen whose names are in bold type served on the regular jury.

of the articles published in the area from which the jury was drawn were not available to defense counsel in the short time before trial, and were not introduced in evidence (D. A. 122, 123, 127, 151, 156). Specific information on to what had been read was not elicited by the Court (D. A. 127, 131, 193).

The Court below, in affirming the convictions, stated that "there is no question but what the material circulated through the press and other communication media contained statements prejudicial to the defendants" but that the record does not show that the "prejudicial material" was generated by the government. It further held that of the twelve jurymen who tried the case only five had seen the articles introduced in evidence containing the "prejudicial material" and that four of those disclaimed recalling what they had read. It also held that the trial Court had offered defendants an unlimited number of additional peremptory challenges and that defendants had declined to exercise them.

What occurred with respect to additional peremptory challenges is as follows (D. A. 189-190):

> "The Court: The Court in the pre-trial conference with Counsel here, I believe it was April or May the entry is, the Court informed Counsel because of the multiple defendants that were involved in this case for good cause shown he would grant additional challenges peremptorily because of the multiple defendants and because of the desire of the Court to obtain a fair and impartial jury, I would want the defendants to reflect at this time and review the entire 12 jurors that are in the box and inform me if there are **any of them** that you would wish to implore the Court to exercise in addition to the ordinary challenge.
>
> "Mr. Davies: So far as my clients are concerned, there would be **none on those grounds.**

"The Court: **Understand, you are not surrendering the existing motion to the whole panel and those that read the newspaper.**

"Mr. Glazer: Could we have a moment?

"The Court: Yes. You just review them and if there are some you don't like the **color of their eyes or something,** let's get rid of them.

"Mr. Glazer: Just so the record is clear as far as the 12 are concerned, we do not want any additional peremptorial challenges for the reason from all the jurors we have examined, **they have, practically all of them read the newspaper and it would be impossible** ——

"The Court: (Interposing) **We don't need to repeat that. You have your standing objection to that.**

"Mr. Shenker: Let the record show **we are renewing our** request to the **challenges** for cause **to the entire panel** for the same reasons we gave before.

"The Court: You understand the Court has recognized that. **I stand on that order,** but what I have this time afforded you is an opportunity to review your jurors. **If for any other ground you don't like the way their ears set in**

"Mr Glazer: (Interposing) The only other thing, your Honor, I would like in view of all the voir dire examination at this time, would like to renew our motion for continuance.

"The Court: At this time, before the jury is sworn to try this case, Counsel again renews their motion for a continuance heretofore heard.

"Mr. Glazer: And we are adding to that the testimony on the voir dire examination in support of those motions.

"The Court: All right.

"Mr. Glazer: Also our motion for a transfer.

"The Court: Let the record show there will be the same ruling of the Court as on the prior motion.

Does that make your record, gentlemen?" (Emphasis added.)

Subsequent attempt to select alternate jurors unexposed to the newspaper publicity was even less successful than that of the regular jury. Of the twelve who were questioned about publicity (D. A. 191-212), only one had not read about the case on the prior week-end, and four stated that they had formed an opinion as to the defendants' guilt (D. A. 194, 196, 198, 203).

REASONS FOR GRANTING THE WRIT.

1. The evidence showed that the defendants did not register with the District Director of Internal Revenue nor obtain a wagering tax stamp as required by the Occupational Tax Laws (D. A. 221-237, 258-263, 265, 267). On November 29, 1957, federal agents raided their place of business pursuant to a search warrant charging certain of the defendants with conducting a wagering business without first registering and purchasing a stamp (G. A. 2181). The defendants were forthwith arrested, and subsequently indicted (D. A. 60-61, 66). Count 3 charged them with having violated the Occupational Tax Law by failing to register before engaging in the Wagering Business (D. A. 28).

Count 3 of the indictment charged that in October, 1957, defendants were engaged in the wagering business as co-partners, accepting wagers upon which the federal excise tax was due, that as co-partners they were required to file a wagering excise tax return on or before November 30, 1957 (i. e. after their arrest); that, with knowledge of the foregoing, defendants did wilfully attempt to evade the excise tax by failing to file a wagering excise tax return and to pay the tax, and by doing certain acts for the purpose of concealing the correct amount of the wagers accepted by them (D. A. 25-26). Count 4 contained simi-

lar charges for November with the date alleged for filing as December 31, 1957 (D. A. 26-28). Count 1, the conspiracy count, charged that defendants conspired to wilfully attempt to evade the excise tax on wagers, that the object of the conspiracy was to be accomplished by concealing the existence of the wagering business, by maintaining incorrect books and records, by engaging in the wagering business without first paying the wagering occupational tax and by failing to file a wagering excise tax return and pay the tax for September, October and November, 1957 (D. A. 18-23). Count 2 alleged the substantive charge for the month of September with the return date being October 31, 1957 (D. A. 23-24).

The gravamen of the three substantive felony counts and the conspiracy count is the failure to file wagering excise tax returns, and to pay the tax. Over objection, the Court admitted evidence that the defendants failed to file excise tax returns, even when due after their arrest (D. A. 226-235). The Court also refused to instruct the jury to disregard such evidence (G. A. 2031-2032). Since the Court also instructed the jury that if it found a defendant guilty on one count, it could consider such guilt in determining his intent on any other count (D. A. 1490), the evidence of their failure to file the returns after their arrest, permeated all counts of the indictment.

We submit that this procedure violated the defendants' Fifth Amendment rights against self-incrimination. Before the October and November wagering tax returns were due (being November 30 and December 31), defendants were actually charged with having, during those very months, engaged in the wagering business without having first registered for such occupation. It cannot be doubted that any action by the defendants with respect to those returns or the tax (not generally required of people), would have incriminated them under an existing charge. See **Irving v. California**, 347 U. S. 128, 130. Indeed, we also

believe that the defendants could not constitutionally be required to file the return for September, since it would have incriminated them concerning past acts, i. e. their failure to register before beginning the wagering business. **United States v. Ansoni**, 138 F. Supp. 451, 453 454 (N. D. Ill.). See **United States v. Kohringer**, 345 U. S. 22, 32; **Lewis v. United States**, 348 U. S. 419.

But certainly, once having arrested and charged them, the Government is precluded from proving crimes not yet fully consummated but which the defendants cannot avoid without affirmatively incriminating themselves on existing charges. Defendants cannot be placed in such a dilemma. Cf. **Jones v. United States**, 362 U. S. 257. The Government having chosen to make the arrest and charge, is precluded from proving their failure to act thereafter where such action would incriminate them.

United States v. Sullivan, 274 U. S. 259, holding that one may be required to file an income tax return, is inapposite, for that opinion recognizes that incriminating information as to past actions is privileged. Here, the mere filing of a wagering tax return or paying the tax would have incriminated the defendants.

The importance of the question here presented was pointed up by the recent decision of this Court in **Communist Party v. Subversive Activities Control Board**, ... U. S. ..., 81 S. Ct. 1357. The majority, finding the issue as to whether the order directing the Communist Party to register constituted compulsory self-incrimination to be premature, recognized that a registration statute requiring information concerning a past potential crime raised a difficult question as to the applicability of the Fifth Amendment. The four dissenting Justices held that the privilege of self-incrimination was violated by the order. The instant case is a stronger one for the privilege of silence. Clearly here self-incrimination was required after arrest; and, unlike the **Subversive Ac-**

tivities Control Board case, there can be no application of the corporation and organization principle of **Wilson v. United States**, 221 U. S. 361, and **United States v. White**, 322 U. S. 694.

Certainly the proof of the defendants' failure to speak and act as an element of a crime, where to have done so would have incriminated them in another past crime, is reversible error. Cf. **Grunewald v. United States**, 353 U. S. 391, 416; 77 S. Ct. 963, 980.

2. The erroneous interpretation placed on the record by the Court below effectively undermines **Marshall v. United States**, 360 U. S. 310. It cannot be doubted that defense counsel challenged all veniremen who had read articles about the case, which were, indeed, virtually the entire panel; and that they requested a continuance and a transfer (D. A. 87-90, 189-190). Moreover, it cannot be asserted on this record that a jury could have been selected of people who had not read or heard something about the case. What the Court below holds, as we understand it, is that, since the Court offered additional peremptory challenges (we do not understand it to have been unlimited) defendants should have undertaken to select a jury which asserted that it had not read or retained the prejudicial information contained in the particular articles introduced in evidence. We did not deem that practical or that it would assure the defendants a fair jury. Nor do we understand that we could have exercised peremptory challenges for that purpose.

There is no practical way of selecting a jury from a panel which has been exposed to prejudical newspaper publicity. For when the entire panel admits, as here, that they have read about a case which created as much community interest as this one, and defense counsel knows that prejudical publicity has been dispatched, there really is nothing he can do to assure an unbiased jury. For if he seeks the details of each jurors knowledge he not only

runs the risk that prejudicial information will be spread to perhaps some who have not read, **Coppedge v. United States**, 272 F. 2d 504, 508 (D. C. Cir.), but also he knows that those who speak most frankly are apt to be the fairest jurors. Regardless of frequent writings to the contrary, we know from experience that in a case of widespread interest and publicity such as this one, the jurors have read and retained. We have no doubt that each juror thought he could cast aside any bias, but **Marshall** teaches that such jurors cannot dissolve their minds of unconscious predisposition against the defendants. See also **Coppedge v. United States**, 272 F. 2d 504, 508 (D. C. Cir.); **United States v. Jacongilo**, 281 F. 2d 574, 576-577 (3 Cir.); **United States v. Alker**, 180 F. Supp. 661, 664 (E. D. Pa.); **Janko v. United States**, ... U. S. ...; 81 S. Ct. 1662; **Irving v. Dowd**, ... U. S. ..., 81 S. Ct. 1639.

We submit that, when a trial has not yet commenced, a defendant should not unnecessarily be required to have his liberty determined by a panel such as the one in the instant case. **Delaney v. United States**, 199 F. 2d 107 (1 Cir.); **Irving v. Dowd**, ... U. S. ..., 81 S. Ct. 1639. In a case such as this, the only way a defendant can get a fair trial is for the Court to exercise its discretion and transfer it to another district or grant a continuance.

Nor do we believe the Government was innocent of creating the publicity. Newspaper reporters, even from Indianapolis, were present at the raid (D. A. 62, 780-782) and the United States Attorney admitted that he talked to the press just before the trial commenced (D. A. 107-108). He also admitted this in oral argument in the Court below. See **Delaney v. United States**, supra; **Henslee v. United States**, 246 F. 2d 190 (5 Cir.); **Griffin v. United States**, 294 Fed. 437 (3 Cir.); **Briggs v. United States**, 221 F. 2d 636 (6 Cir.); **Harrison v. United States**, 200 Fed. 662 (6 Cir.). At least the defendants made a prima facie

case and the Government should have been required to come forward with the evidence. Cf. **Campbell v. United States**, 365 U. S. 10. See G. A. 65-67.

3. The Court below misapplied **Ingram v. United States**, 360 U. S. 672. It allows a conviction to stand upon jury findings that petitioners were merely partnership employees. (See instructions at D. A. 1543-1544; 1549-1551). It concludes that the fact that "Wyatt's occupational tax stamp was posted on the wall of the room" conveyed knowledge to the employees that their employers were evading the excise tax.

Liability for the excise tax is placed by 26 U. S. C. 4401 on the proprietor of a wagering business. Until the enactment of an amendment after the alleged violation in the instant case, an employee was not liable for the excise tax even if he received wagers for the wagering business. The fact that an employee knows that his employer has or does not have an occupational tax stamp does not give him knowledge that his employer is cheating the Government out of excise taxes or is not filing excise tax returns. The posting of defendant Wyatt's stamp does not supply this knowledge. Indeed, as we have pointed out, two of the excise tax returns involved were not required to be filed until after the raid which frustrated the gambling business. How could employees know that they would not be filed? The error in the convictions as to these two returns permeated all counts of the indictment because the Court instructed the jury that if it found a defendant guilty on one count of the indictment it could consider this guilt for the purpose of finding intent on any other count (D. A. 1490).

Nor was there other evidence sufficient to show that petitioners had knowledge that defendants Shaffer and Horwick would not file returns nor pay the tax. Most bets were taken by Shaffer and Horwick. Petitioner

Tamer registered in a Terre Haute Hotel on September 13 (D. A. 371-373, 389), but he left Terre Haute before the raid (D. A. 382, 391, 394). He rented a safe deposit box at a Terre Haute bank, which he entered only twice on October 15 and 31. When he cancelled it by mail on December 5, it contained nothing (D. A. 424, 428, 433-435) so clearly it had nothing in it after October 31. Petitioner Tamer was rarely seen at the Manor House Restaurant and it was questionable as to whether he was there in September (D. A. 492, 508-510, 523-524). No bettor witness testified that he placed a bet with petitioner Tamer. It is true that ten (10) of the 611 bet slips were in Tamer's handwriting (D. A. 1353-1355, 1384), but this proves no more than that petitioner Tamer was a clerk. The fact that he left the enterprise before the raid indicates that he was not a proprietor.

Petitioners Gordon and Share registered in a Terre Haute hotel on September 21 (D. A. 392-393, 378-379), a week after Shaffer and Horwick arrived (D. A. 371-373, 389). No bettor placed a bet with Gordon, and only a few with Share. There were 31 bet slips in Gordon's handwriting (D. A. 1339-1340; 1383-1384), and 84 in Share's (D. A. 1360-1361; 1385), but, again this only proves that they were clerks.

4. The search warrant stated that there was probable cause to believe that property was being used on the searched premises "in connection with the operation of a wagering business which [is] being used by persons . . . who have failed to register and pay the occupational-wagering tax for the fiscal year July 1, 1957 (A. 2181). The crimes upon which the warrant was based are the offenses of failing to register and pay the occupational-wagering tax, crimes of omission, not of commission. See **Spies v. United States**, 317 U. S. 492.

At least a substantial part of the items seized were not subject to seizure under any theory. They did not con-

stitute instrumentalities for the commission of any federal crime upon which the search warrant was based but were merely evidentiary materials which may not be seized either under the authority of a search warrant or during the course of a search incidental to an arrest. **Harris v. United States**, 331 U. S. 145, 154; **Abel v. United States**, 362 U. S. 217, 238. Certainly this is true of the summary records of amounts accrued on past bets, which were nothing more than accounting records.

In determining whether or not any item seized may be considered an instrumentality of the crime set forth in the search warrant it is necessary to consider the nature of the offense involved. The gambling occupational tax law, as well as the excise tax law which was not alleged in the warrant, do not place a license upon gambling nor prohibit wagering. Rather they impose taxes and certain registration requirements prior to engaging in the gambling business. Implicit in **United States v. Kahringer**, 345 U. S. 22, which upheld the validity of the Act, is the premise that Congress did not intend to regulate the business of gambling as such.

What then are the instrumentalities of the crime? Certainly not property which may be considered to be the instrumentality of a state wagering crime. The question rather is whether property used in a gambling operation may be considered to be an instrumentality of the crime of failing to register under the occupational tax provisions of the act, or perhaps the excise tax provisions.

A person is required to register and pay the special occupational tax prior to engaging in the wagering business. Wagering creates a tax liability and a liability to register. It is not the gambling which is a violation of the law, but the failure to register and to pay the tax. We submit that any property used in the business of gambling is not used for the commission of the offense but is evidentiary of it. The property so used is merely

evidence of these past criminal acts of failing to register and pay the occupational tax and is not used for the commission of these acts. Even bet slips are not instrumentalities of violating the law but merely records or evidence of bets. Since no property is the means of committing such an offense, all property seized was merely evidentiary and not subject to seizure under the Fourth and Fifth Amendments.

In any event, there were some items which beyond doubt cannot be considered to be instruments of a federal crime, such as the records of accounts, check books, bank deposits book and bank statements. It is clear none of these items recorded any bets at the time taken and their possession violated no law. Their value in this case was as evidence. These would clearly be evidentiary material the seizure of which is forbidden under all circumstances. **Harris v. United States**, 331 U. S. 145, 154.

Moreover, the search warrant did not limit the seizure to items which could be considered to be instrumentalities of crime. Rather it was a general warrant, calling for the seizure of all books and records as well as other items. It was, therefore, invalid as calling for a clear sweep seizure. **Kremen v. United States**, 353 U. S. 346; **Marcus v. Search Warrants**, U. S., 81 S. Ct. 1708. Further the agents did not execute the warrant in the manner required by **Miller v. United States**, 357 U. S. 301. They entered without giving prior notice of their authority and purpose.

5. Count V charged that defendants "engaged in the business of accepting wagers as co-partners of a wagering syndicate, knowing that they were required to pay a special occupational tax and to file a special tax return" "did wilfully and knowingly fail to register" with the District Director of Internal Revenue "in violation of Section 7203, Internal Revenue Code . . ." (D. A. 28-29).

See also instruction at D. A. 1549. Under this Count, each petitioner was given a one year consecutive sentence and fined $5,000.00 (D. A. 1582-1591).

Section 7272 of the Internal Revenue Code makes it a crime to fail to register with the Secretary or his delegate if required by the Internal Revenue Code, imposing a penalty of $50.00. It is broad enough to include any failure to register required by any provision of the Internal Revenue Code. The charging part of the indictment, that defendants knowingly failed to register, followed the language of Section 7272 and not the phrasing of Section 7203.

Section 7203 makes it a crime for any person, required to pay a tax or make a return, to wilfully fail to pay the tax or make the return. It authorizes a maximum penalty of one year imprisonment and a fine of $10,000.00. The citations of a statute in an indictment are immaterial in determining the nature of the charge; the allegations of fact determines the crime charged. **Williams v. United States**, 168 U. S. 382, 389. We submit that the sentence under this count was excessive and void.

CONCLUSION.

We respectfully submit that for the reasons stated hereinabove, the petition for writ of certiorari should be granted.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit.

September Term, 1960 April Session, 1961

Nos. 12862-12867.

United States of America, Plaintiff-Appellee, v. Leo Shaffer et al., Defendants-Appellants.	Appeals from the United States District Court for the Southern District of Indiana, Terre Haute Division.

June 13, 1961

Before Schnackenberg, Castle and Major, Circuit Judges.

Castle, Circuit Judge. Defendants-appellants, Leo Shaffer, Philip Share, Irwin Gordon, James Tanner, Jules Horwick and Edgar M. Wyatt were convicted on all counts of a five count indictment. Each was sentenced to concurrent four year terms on the first four counts, to a one year consecutive term on Count V, and was fined $10,000.00 on Count I, $10,000.00 on Count II and $5,000 on Count V, making a total of five years imprisonment and $25,000.00 in fines.[1]

Count I of the indictment charges that defendants engaged in the business of accepting wagers as co-partners

[1] Joseph Jacobson and Charles L. Sumner were also named as defendants and convicted. Their prison sentences were suspended and they did not appeal.

in a wagering syndicate at Terre Haute, Indiana, and in violation of 18 U. S. C. A., § 371 conspired to wilfully attempt to evade and defeat a large part of the excise tax on wagers due and owing under Section 4401 of the Internal Revenue Code of 1954 for the months of September, October and November, 1957. Count II charges that defendants as co-partners in a wagering syndicate wilfully and knowingly attempted to evade and defeat the excise tax due on wagers totalling $326,315.20, accepted in the month of September, 1957, in violation of 26 U. S. C. A., § 7201. Count III and IV charge identical violations pertaining to wagers accepted in November and December 1957 totalling $1,305,260.80 and $1,631,576.00, respectively. Count V charges that the defendants were engaged in the business of accepting wagers as co-partners of a wagering syndicate during the aforementioned period and that they violated 26 U. S. C. A., § 7203 by wilfully and knowingly failing to register as required by Section 4412 of the Internal Revenue Code of 1954.

Defendants in their appeals assert numerous errors which may be summarized as presenting the following basic contested issues:

(1) Whether or not the defendants were tried by a fair and impartial jury.

(2) Whether or not there was substantial evidence sufficient to sustain the convictions of the defendants.

(3) Whether or not there was a variance between the indictment and the case as it was submitted to the jury under the instructions.

(4) Whether or not there was prejudicial and reversible error in the admission of evidence or in instructing the jury.

(5) Whether or not prejudicial and reversible error resulted from the government's calling of witnesses who invoked the Fifth Amendment.

(6) Whether or not the sentence imposed on each defendant under Count V of the indictment is excessive.

On the issue of whether there is substantial evidence to support the convictions we must view the evidence in the light most favorable to the government. It is not for us to weigh the evidence nor reject inferences properly deducible therefrom. **Glasser v. United States**, 315 U. S. 60, 80; **United States v. Coduto**, 7 Cir., 284 F. 2d 464, cert. den., 365 U. S. 881; **United States v. Pinna**, 7 Cir., 229 F. 2d 216. With that rule in mind, we shall briefly refer to the facts and circumstances as developed by the proof.

From about the middle of September until November 30, 1957 a wager accepting business was conducted by telephone from a third-floor room in Terre Haute, Indiana, accessible from a street level entrance designated as 671½ Wabash Avenue. Most of the wagering was on the scores of college and professional football games. The bets were in sizable amounts, many ranging from $1,000.00 to $10,000.00, and totaled over three million dollars. The wagers were with bettors scattered throughout the United States from coast to coast and were received by long distance telephone calls.

In August of 1957 defendant Edgar M. Wyatt, a resident of Terre Haute, rented the room for a term of four months commencing September 1, arranged for the installation of eight telephones operating in banks of four with one unlisted number assigned to each bank, and for the receipt of sports wire service. He deposited $5,000.00 to cover estimated long distance tolls for a thirty day period and paid in advance for fifteen days' billing on the wire service.

About the middle of September the other defendants arrived in Terre Haute from various other cities. Shaffer, Jacobson, and Tanner checked in simultaneously at a local

hotel where Wyatt had previously reserved a suite of adjoining rooms for them. Horwick registered at a nearby hotel but a few days later removed to the hotel where the others were staying and occupied a room close to the suite. Share and Gordon arrived about a week later and Sumner shortly thereafter. Sumner was assigned to the suite occupied by Shaffer and Jacobson. The hotel was about two hundred feet from the entrance at 671½ Wabash Avenue.

All of the defendants were observed frequently in a restaurant adjacent to the entrance to the room and during periods when the latter premises was under surveillance were observed entering at various times in the morning, each using his own key to open the street level door which was always kept locked. The defendants usually left the premises together each evening. During the two and one-half month period involved over five thousand long distance telephone charges were made to the telephones.

More than fifty witnesses testified to placing bets by telephone on calls to the two unlisted numbers assigned to the telephones. Some asked for one of the individual defendants when they called, others placed their bets with whoever answered the phone or with someone to whom the defendant called transferred the call. In a number of instances bettors who had lost were instructed to remit the cash by registered mail to E. M. Wyatt or E. M. Wyatt & Company although they knew neither and had placed their bet with one of the defendants other than Wyatt. One bettor on inquiring whether he was betting with defendant Shaffer was informed "Yes, with his company".

On November 29, 1957 the room was entered pursuant to a search warrant at approximately 1:30 P. M. Horwick was leaving the premises. The remaining defendants, except Tamer, were in the room, three engaged in telephone conversations. Among other items, a record of

bettor accounts receivable and payable was found on the premises. It reflects the net amount due from or payable to each bettor. There is no indication that the amount is due to or payable by any particular one of the defendants. Also found were betting slips recording wagers in the handwriting of all six defendants and schedules on which a running balance of the gross amount wagered on each game yet to be played was recorded. These amounts were identical with the total of the betting slips on the particular game. Where a game had been played there was an entry of the net gain or loss on that game.

None of the defendants had filed the special tax return and application for registry wagering or a monthly excise tax return, as partners or members of any group or syndicate. With the exception of Wyatt, none of the defendants registered as being engaged in the business of accepting wagers during the period in question. In August of 1957 Wyatt had withdrawn from a partnership, known as the Clover Club, engaged in the business of accepting wagers at Terre Haute. He had previously signed and filed the special tax returns and applications for registry-wagering on behalf of that partnership which listed and identified the partners as required by law and pertinent Treasury Regulation. On September 12, 1957 Wyatt filed a special tax return and application for registry-wagering at 671½ Wabash Avenue listing himself as the owner and stating he was in the business of accepting wagers on his own account. He filed monthly excise tax returns for the months of September, October and November, 1957. They were signed "E. M. Wyatt, owner" and in the aggregate covered the tax due on wagers in the amount of $5,625.00.

We have not attempted to set forth the evidence in detail but from a careful study of the record we are convinced that there was ample and substantial basis for the jury to conclude that the defendants conspired to utilize the registration and the monthly tax returns of Wyatt as

a front to mask the magnitude of the wagering operation they actually conducted with the plan and design of evading the substantial tax actually due. The defendants' contention that the evidence does not support a conclusion that the operation conducted at 671½ Wabash Avenue was a partnership[2] or syndicate operation is without merit.

The defendants complain of certain of the court's instructions asserting that they are confusing and repugnant. Much of defendants' argument in this respect is directed to features which were not made the basis of objections presented to the trial court and which arise only if the specific language is isolated and considered out of context. We have examined the instructions and it is our opinion that when considered in their entirety they contain no reversible error. In fact their detail evidences the exercise of meticulous care in informing the jury of the extent of the government's burden under the indictment. And the instruction given on guilt as an aider or abettor correctly states the law. The District Court did not err in giving that instruction nor the instructions it gave on conspiracy.

There is no evidence here that the acts of concealment were for the purpose of concealing prior criminal acts and the instructions tendered on such theory were properly refused. **United States v. Clancy**, 7 Cir., 276 F. 2d 617.[3] Nor was there a basis for the lesser included offense instructions requested by defendants. Here it was possible to have committed the greater offense charged without having committed the lesser (evasion of the occupational tax on wagering in violation of 26 U. S. C. A.,

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[2] 26 U. S. C. A., § 7701 defines "partnership" as including a "syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation or venture is carried on. . . ."

[3] Reversed on other grounds, 365 U. S. 312.

7262). The instructions were properly refused. Cf. **James v. United States**, 9 Cir., 238 F. 2d 681; Rule 31 (c), Federal Rules of Criminal Procedure, 18 U. S. C. A.

Defendants claim there is a variance between the indictment and the instructions under which the case was submitted to the jury. It is argued that a fatal variance resulted from the instructions permitting conviction of all defendants if any two or more were members of the specific partnership charged in the indictment and the remaining defendants were aiders and abettors. We do not agree. The elimination of one or more of the defendants as a member of the wagering syndicate does not eliminate the existence of the syndicate. And it is not necessary that aiders and abettors be charged as such in the indictment. **United States v. Monticello**, 3 Cir., 264 F. 2d 47; **Mays v. United States**, 8 Cir., 261 F. 2d 662. There was no variance and **Stirone v. United States**, 361 U. S. 212, relied upon by defendants is without application.

Defendants' reliance upon **Ingram v. United States**, 360 U. S. 672, is misplaced. **Ingram** involved convictions of conspiracy to evade and defeat payment of the wagering excise tax but the convictions which were reversed were those of two employees without proprietary interest in the operation and the reversals were based on a lack of evidence of any knowledge of the employers' tax liability. Evidence of knowledge was not lacking in the instant case. Wyatt's occupational tax stamp was posted on the wall of the room.

The defendants contend that the District Court committed reversible error in the admission of testimony and exhibits concerning the previous partnership relationship of Wyatt in the Clover Club operation and the special tax returns and applications for registry wagering executed and filed by him which listed the partners in that operation. At the time of its admission this evidence was limited to defendant Wyatt and it was admissible to show hi-

knowledge of the wagering-registry requirements of the Internal Revenue Code. We perceive no error in this connection. Nor was it a basis for a mistrial or severance.

It is urged that the court erred in permitting a government witness, whose qualifications are not in dispute, to testify as to his computation of the gross amount of wagers reflected in the records found in the room. The hypothetical questions asked assumed that the wagering operation was a co-partnership otherwise their answers simply represented a computation of the amount of wagers from records in evidence. The court carefully instructed the jury that it was not to take for granted that the statements contained in the hypothetical questions are true but should carefully scrutinize the evidence to so determine and give no weight to opinions based on any material statement found not to be true. The court did not err in the admission of this testimony.

Defendants claim that the court erred in admitting into evidence, and in failing to strike, testimony that the defendants other than Wyatt failed to file excise tax returns. But this evidence clearly had a relevant and material bearing on the case. Evidence tending to negate that defendants were operating as individuals and not attempting to evade any tax due was admissible. And there is no merit to the contention that defendants' privilege against self-incrimination was violated by the admission of such testimony.

The joint motion of certain of the defendants to quash the search warrant and suppress evidence was properly overruled. An examination of the face of the warrant shows that it is completely adequate and states sufficient grounds for its issuance. And, contrary to defendants' contentions, the items seized at the time of the search and later admitted in evidence were all instrumentalities of the crime. The betting slips, schedules of gross amounts wagered on each game, record of accounts receivable and

payable and other records were all items utilized in the continued operation of the venture and instrumentalities of the crime charged. **United States v. Lefkowitz**, 285 U. S. 452; **Marron v. United States**, 275 U. S. 192, 199; **Merritt v. United States**, 6 Cir., 240 F. 2d 19.

During the trial the government called over sixty witnesses in corroboration of the betting records and toll slips. Nine of these invoked the Fifth Amendment. Six of the nine had claimed the privilege before the grand jury. The error, if any, in calling such witnesses is cured by the cautionary instruction given by the District Court. **United States v. Magin**, 7 Cir., 280 F. 2d 74, 79.

Count V of the indictment charged a violation of 26 U.S.C.A. §7203. The punishment imposed was within that authorized by that statute and on the record and under the circumstances here involved it was not excessive. **United States v. Coduto**, 7 Cir., 284 F. 2d 464, 469, cert. den., 365 U. S. 881; **United States v. Chicago Professional Schools, Inc., et al.**, 7 Cir., concurring opinion, April 26, 1961, ... F. 2d ... . Defendants' contention that Count V charges a violation of 26 U.S.C.A. §7272 (which imposes "a penalty of $50") rather than of §7203 is without substance.

Defendants assert that because of prejudicial newspaper, radio and television publicity occurring on the eve of the trial they were not afforded a trial by an impartial jury. The trial commenced on a Monday. The publicity in question occurred during the previous week-end. There is no question but what the material circulated through the press and other communication media contained statements prejudicial to the defendants, characterizing some as professional gamblers, others as ex-convicts, and containing representations of prior criminal activities and convictions. Although defendants contend that the pre-trial publicity was generated at least in part by the government the

record does not support them in this contention in so far as any of the prejudicial material is concerned.

On the morning of the trial defendants filed a motion for an indefinite continuance followed by a motion that the case be transferred to another district, both of which were overruled. The District Court carefully interrogated each prospective juror on voir dire examination as to whether or not the newspaper articles, radio broadcasts or telecasts had come to his attention and requested the parties to submit any additional questions which either party felt should be propounded to the jurors. Defendants submitted none.

Of the twelve jurymen who tried the case, only five had heard of the case through the newspaper articles in question. Four of these could not recall what they had read in the articles. One just saw the headlines and did not recall the article itself. Each of the twelve jurors stated that he had formed no opinion as to the guilt or innocence of the defendants. None had any opinion concerning any of the facts of the case because of anything they had read or heard about it and all twelve stated that they would rely entirely upon the evidence to be heard in arriving at a verdict. Following the selection of the twelfth juror but before the jury was accepted or sworn the court gave the defendants an unlimited number of additional peremptory challenges. Defendants declined to exercise the unlimited additional peremptory challenges offered and accepted the entire jury panel, subject to their standing objection for cause. During the voir dire examination defendants had requested that all jurors who had heard of the case through the pre-trial publicity here in question be excused for cause.

Defendants rely heavily upon **Marshall v. United States,** 360 U. S. 310 as sustaining their contention that they were not afforded a trial by a fair and impartial jury

and that the case should be reversed and a new trial awarded. In our opinion the defendants' refusal to exercise the peremptory challenges offered them precludes any application of **Marshall**. In **Marshall** the prejudicial newspaper articles were read by jurors during the trial of the case and there was no opportunity to secure others in their place. The record in this case does not establish that it was impossible to secure jurors who had not seen or heard the publicity in question. Seven of the jurors who tried the case had not and at the time defendants refused the additional peremptory challenges and accepted the jury forty veniremen had not yet been called or interrogated on voir dire examination. In **Marshall** it was recognized that the trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles and that each case must turn on its special facts. On the record before us we find no reversible error on this issue.

We have considered all other issues raised by the defendants but find the arguments advanced in support thereof to be without merit. We have not made specific reference to many of the authorities cited and analyzed in the briefs but we have considered them and each of the arguments advanced by defendants in support of their position on the issues and discussed those issues we deemed necessary.

We conclude that the defendants were accorded a fair and impartial trial free from reversible error. Each of the judgments of the District Court is affirmed.

Affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of
Appeals for the Seventh Circuit.

United States Court of Appeals
For the Seventh Circuit.
Chicago 10, Illinois.

Tuesday, June 13, 1961.

Before
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Latham Castle, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.

United States of America,
Plaintiff-Appellee,

Nos. 12862 thru 12867

vs.

Leo Shaffer, Philip Share, Irwin Gordon, James Tanner, Jules Horwick, Edgar M. Wyatt,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Terre Haute Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Terre Haute Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby, Affirmed, in accordance with the opinion of this Court filed this day.

United States Court of Appeals
For the Seventh Circuit.
Chicago 10, Illinois.

Wednesday, August 2, 1961

Before
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Latham Castle, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.

United States of America, Plaintiff Appellee, Nos. 12862 through 12867 vs. Leo Shaffer et al., Defendants-Appellants.	Appeals from the United States District Court for the Southern District of Indiana, Terre Haute Division.

It Is Ordered by the Court that the petition for a rehearing of this cause, filed herein on June 27, 1961, on behalf of defendants-appellants Leo Shaffer, Jules Horwick and Edgar M. Wyatt, and the petition for a rehearing filed herein on June 27, 1961, on behalf of defendants-appellants Philip Share, Irvin Gordon and James Tanner, be and the same are hereby, Denied.

Office-Supreme Court, U.S.
FILED
OCT 11 1961
JAMES R. BROWNING, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 379.

PHILIP SHARE, IRVIN GORDON and JAMES TAMER,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 379.

PHILIP SHARE, IRVIN GORDON and JAMES TAMER,
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v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF.

ARGUMENT.

1. The Government misconceives, and only responds to a minor premise of, this contention (Br. Op. 9-10). On November 29, 1957, the defendants were arrested and charged with having conducted a wagering business without first registering and purchasing a stamp, in violation of the Occupational Tax Laws. Thereafter, they were further charged with having wilfully failed, after their arrest and while the Occupational Tax charges were pend-

ing, to file excise tax returns and to pay the excise tax on the very business operations concerning which they were already charged. Obviously, had they filed the excise tax returns and paid the excise taxes, they would have incriminated themselves on pending charges. Moreover, the Government had seized and possessed their records, making it impossible to file the returns.

It is our contention that the Government, having chosen to make the arrest and charges before the excise taxes were due, is precluded from bringing **criminal** charges predicated upon subsequent inaction, where affirmative action would have incriminated the defendants on pending charges.

The proof of their failure to make the returns and pay the tax after arrest was clearly prejudicial as to all counts of the indictment, including the count for September. The vast majority of the alleged wagers upon which the tax was not paid were taken during the months of October and November (upon which wagers the tax was not due until after the defendants' arrests), the business having only started in mid-September. In addition, the Court instructed the jury that it could consider a defendant's guilt on any one count in determining his intent with respect to any other count (D. A. 1490), thus the proof as to October and November was considered by the jury in deciding the September count.

2. As to whether the Court "conducted a searching and full examination of the veniremen" (Br. Op. 10-12) concerning the newspaper publicity (D. A. 115-211), depends upon what one considers necessary for a fair trial. If, as the Government states, all that is important is "the attitude of the jurors" (Br. Op. 12, note 6), it is true that the Court exacted a promise from each venireman that he would not consider the newspaper information (D. A. 116, 118, 121, 123, 124, 126, 128, 130, 136, 149, 152, 153, 155,

157, 161, 163, 167, 169, 178).[1] We read **Marshall** to mean more than that. For such a promise does not insure a fair trial. Nor do we fear that jury trials cannot be maintained if this Court requires standards by which an accused may be safely tried. Indeed, we believe, such requirement will stop most prejudicial publicity.

3. The Government's argument (Br. Op. 14) shows on its face that the Court did not require in its instructions that the jury find that mere employees (permitted to be convicted as aiders and abettors) knew that the principals were not paying the tax, contrary to **Ingram**. The Government notes that the "trial judge specifically instructed the jury that if any defendant was not a partner and was 'merely an employee of the alleged partnership * * * you must acquit such defendant of all Five (5) Counts of the Indictment; providing such employee was not an aider or abettor as defined in Instruction No. 41' (Instruction No. 36, A. 1543-1544). He also instructed that any defendant who did not have knowledge of the wagering tax law requirements should be acquitted (A. 1545-1546)." But the Court did not instruct that mere employees must know that their employers were not paying the tax.

4. If books of account and bank records are instrumentalities of tax evasion, as the Government contends (Br. Op. 16), the Fourth Amendment has been whittled away to naught and such decisions as **Harris v. United States**, 331 U. S. 145, no longer have any vitality. For all such books and records are now "closely related" to the subject of taxation.

5. We do not regard our contention that the defendants were improperly sentenced under Count V as "frivolous"

[1] But the knowledge of the jurors was not elicited, and indeed avoided (D. A. 127, 131).

(Br. Op. 16). The Government notes that Section 7203 contains the word "willfully" while Section 7272 does not, but it ignores the fact that Section 7203 makes no reference to failure to register, while Section 7272 specifically applies to failure to register, the conduct with which the defendants were charged. Apparently Congress chose to penalize all failures to register before beginning business alike, thus not burdening the Government with proof of knowledge of the requirement. Certainly the Government cannot write the offense into Section 7203, which deals only with taxes and returns.

For the reasons stated in the petition and herein, we submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 379.

IN THE

SUPREME COURT OF THE UNITED STATES.

PHILIP SHARE, IRVIN GORDON and JAMES TAMER,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING.

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UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING.

Petitioners pray that this Court grant them a rehearing of its decision of November 13, 1961, denying their petition for a writ of certiorari for the following reasons:

REASONS FOR GRANTING A REHEARING.

1. The Second Circuit in the recent decision of **U. S. v. Vita**, 294 F. 2d 524, 527, decided August 28, 1961, interprets **Marshal v. U. S.**, 360 U. S. 310, 79 S. Ct. 1171, as requiring that any juror be removed if he has read prejudicial newspaper publicity. In the instant case practically the entire panel had read publicity about the case. Much of the publicity was highly prejudicial, reciting prior convictions, etc. of the defendants. Since no separate or indi-

vidual examination of the jurors was made, the Court avoided eliciting their knowledge, but practically all of them had read articles.

2. We did not present in our petition for a writ of certiorari the following two substantial grounds available to petitioners:

A. The petitioners were charged in each count of the indictment with evading a tax imposed on a partnership consisting of the eight defendants. The District Court, over objection (D. A. 1448-1450; 1559-1561; 1570) charged the jury in Instruction No. 35 that it could convict the defendants if they found the partnership to consist of two or more defendants (D. A. 1540-1543). This was a variance from the indictment. **Stirone v. U. S.**, 361 U. S. 212.

B. The Government called nine witnesses whom it knew would refuse to testify on the ground of self-incrimination (D. A. 878, 885, 898, 932, 934-935, 946-948, 951-952, 957, 963-964, 966, 997-999, 1000, 1025-1027). This prejudiced the defendants in the eyes of the jury, since it was shown that these witnesses had dealt with the defendants (D. A. 1212-1217, 1220-1223, 1227, 1283-1284). Cf. **Grunewald v. U. S.**, 353 U. S. 391.

CONCLUSION.

For the reasons set forth above it is respectfully urged that a rehearing be granted.

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We hereby certify that this petition is presented in good faith and not for delay and is restricted to substantial grounds arising from intervening circumstances or not previously presented in the petition for a writ of certiorari.

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